LOCAL GOVERNMENT SERVICES JOB EVALUATION SCHEME:

TECHNICAL NOTE NO. 13: IMPLICATIONS OF MERGERS, SHARED SERVICE ARRANGEMENTS AND OTHER RE-CONFIGURATIONS IN THE LOCAL GOVERNMENT SECTOR

1. **INTRODUCTION**

1.1 This Technical Note examines the implications for job evaluation of the various forms of bringing together or re-configuring of local authorities, which impact on the structure of one or more organisations.

1.2 This includes the introduction of shared services arrangements of all types, including:

- relatively informal arrangements where one council provides services to another (under which employees from one council may or may not be seconded to the other council)
- formal arrangements for one council to provide services to another, under which employees from one council may TUPE transfer into another, or be seconded to the other.
- shared service(s) managed by joint committees of councillors (e.g. through a s.101\(^1\) committee)
- the establishment of a joint venture company or another distinct legal entity, including ‘arms length’ bodies, to provide the services for the participating councils (and others) under which employees from the participating councils TUPE to the new legal entity or are seconded to it.

1.3 This Technical Note uses the term ‘re-configuration’ to cover all types of structural re-organisation.

1.4 For the purposes of this Technical Note, which deals with job evaluation, grading and pay issues, all such re-configurations can usefully be divided into two groups:

(1) Where employees working in the re-configured service are employed by two or more separate employers, for example, in informal shared service arrangements through to employees in an ‘arms length’ organisations working alongside council employees;

(2) Where the employees of the re-configured service or function are employed by a single employer, for example, where employees from more than one organisation are transferred under TUPE or similar arrangements into one organisation (whether ‘arms length’ or otherwise)

\(^{1}\) Section 101 of the Local Government Act 1972
or where employees from one or more organisations are transferred to
work alongside employees already employed in another organisation.

1.5 Although prepared under the auspices of the Local Government Services NJC
JES Technical Working Group, the guidance in this Technical Note clearly
applies whatever job evaluation scheme(s) are in use.

2. THE LEGAL POSITION

2.1 The legal position in relation to job evaluation and equal pay issues depends
primarily on who is the employer of the employees in the shared service/re-
configured organisation, as that affects who is a valid comparator for the
purposes of an equal pay claim under the Equality Act 2010. Therefore, the
main legal issues are set out below with reference to the two categories
identified in section 1 above i.e. (1) where the employees are employed by
two or more separate employers or (2) where the employees are employed by
the same employer. It does not cover all of the issues, but summarises the
main ones.

(1) Employees employed by two or more separate organisations

Where employees are employed by two separate organisations, the
starting point is that, subject to some exceptions, an employee in one
organisation cannot bring an equal pay claim using a comparator
employed in the other organisation, even if they are based in the same
place and are managed together, whether under secondment
arrangements or otherwise. This is because the equal pay provisions of
the Equality Act 2010 apply where the employee and her male
comparator (or vice versa) are in the “same employment”, and the first
stage of the definition of “same employment” under the Act is that the
employees are employed by the same employer.

However, the first stage of the definition of “same employment” also
includes the situation where employees are employed by associated
employers. Associated employers are defined as two separate
companies, where one has direct or indirect control over the other, or
where a third person has direct or indirect control over both. A ‘company’
in the equal pay context has been found to include Limited Liability
Partnerships\(^2\). Therefore, in a situation where a council sets up an ‘arms
length’ body over which it retains indirect or indirect control, employees
in those two organisations may be able to bring an equal pay claim using
a comparator in the other. The question of the degree of any control a
body has over the other though will be a question of fact, and as it is

\(^2\) Fox Cross & others v Glasgow City Council [2013] UKEAT 0027_12_2501
crucial to the test of whether two employers are associated, legal advice should be taken when looking at this issue.

In addition, under European legislation it may be possible to make comparisons across employers where there is a ‘single source’ that is responsible for, and capable of addressing, the inequality in pay.

Therefore, to summarise, for situations where employees in the re-configured service are employed by more than one employer, it is not usually possible to take equal pay claims across two separate employers, unless the employers are associated, or there is a ‘single source’ responsible for pay (which probably does not apply in the local government sector).

However, even if cross-employer claims are not possible, in such circumstances, it will still be necessary to consider and decide on issues such as which of the employers will employ any new recruits and how to work with existing arrangements. There may be grievances if employees discover that colleagues are higher graded or paid. There will not usually be legal redress for this through equal pay legislation, but consideration will need to be given as to how such issues are to be handled.

(2) Employees employed by the same employer

Where employees are employed by the same employer (or associated employers or where there is a ‘single source’), employees will then be able to bring an equal pay claim using an employee in the same employer as a comparator, provided they can satisfy the second part of the “same employment” test under the Equality Act 2010. That is that the claimant and comparator are employed at the same “establishment”, or if at different establishments, ones at which common terms and conditions apply.

This is a complex issue, and information on it is available in the Equality and Human Rights Commission’s Code of Practice on Equal Pay [see: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/equalpaycode.pdf] However, employees working together in a re-configured service will normally be based in the same place so will, without getting into any complex analysis, be treated as being in the same “establishment”. Therefore, where there are differences in pay between employees who do work of the same value, the prospect of equal pay claims arises.

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3 Article 157 of the Lisbon Treaty
However, in such cases, if the difference in pay is due to a material factor that is not the difference in sex, the employer may have a valid defence to the claim. When considering re-configured service arrangements, the reason for differences in pay will in many cases be because employees transferred into the employer under TUPE, and the employer cannot reduce employees’ pay, because of the protections afforded under TUPE. Therefore, there is a non-sex based reason for the difference in pay, and in such cases the tribunals have found TUPE to be a valid defence to an equal pay claim, for some time after the transfer.\(^4\)

However, the ‘TUPE defence’ will not apply to new recruits to the organisation who do not transfer in under TUPE. Nor will it apply where a TUPE-transferred employee voluntarily chooses to take up a different post in the organisation on a different rate of pay, or, where under an employer restructuring (of a type that is permitted under TUPE), transferred employees are moved to new posts and different terms and conditions.

3. **TIMING**

3.1 *It is good employee relations practice for a re-configured organisation to assess at an early stage its situation in relation to job evaluation, grading and pay.* As indicated above, issues normally start arising when a new employing organisation wishes to recruit employees, who are not then subject to the protection arrangements of existing employees, or it plans to restructure some or all of the relevant functions.

3.2 Designing a common job structure and implementing job evaluation is a major exercise for any organisation, and in particular for a new organisation, where concerns arising from uncertainty may be heightened. For this reason, it is not an exercise which should be rushed. Time should be taken at the design and planning stages of the exercise to ensure that the proposed new structure is suitable for the organisation’s future needs. Although there could be a transitional risk of equal pay claims, it is likely to be low and probably lower than the risk of claims arising from hasty implementation of a scheme. In the long run, it would be preferable to spend time at the planning stage ensuring that the new structure is ‘fit for purpose’ than to rush the exercise for this reason. However the process should not be unduly protracted.

4. **JOBS AUDIT**

4.1 The first step in introducing a new job structure is to conduct an audit of jobs in the re-configured organisation. This is an HR function, which should be

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\(^4\) See for example Skills Development Scotland Co. Ltd v (1) Buchanan and (2) Holland (UKEATS/0042/10)
carried out in partnership with recognised trade unions. It can be started before the vesting date of the new organisation and can then inform the development of the new job structure. It involves preparing a comprehensive list of job titles within the new organisation and gathering together relevant job descriptions. By comparing job descriptions for similar areas of work it will be possible to identify how many different job roles there are and how many share common job titles. Some roles will be common to all organisations (although their duties may vary) and they are likely to have common job titles. Other jobs may be the same or broadly similar but have different job titles. This is particularly true in administrative and clerical fields. In addition, it is likely there will be a number of ‘one off’ jobs.

4.2 Where jobs are the same or broadly similar but have different job titles, it will be necessary to rationalise job titles, at least for job evaluation purposes. This may appear to be a laborious task but is essential to the next steps in the process and a good investment of time for the future. A decision will need to be made as to whether this is the point at which to agree common job titles for all jobs in the new organisation, in consultation with employees and their trade union representatives.

4.3 It may be that some employees do not have job descriptions or their job descriptions are out of date. Any employees who are without a job description should be issued with an agreed one at this stage. Any out of date job descriptions should be brought up to date. It will not only assist and inform this stage of the exercise but also serve as preparation for the implementation of any ‘new’ job evaluation exercise. Up to date and accurate job descriptions will also allow for more jobs to be matched to an already existing evaluation rather than having to be evaluated separately.

5. DESIGNING A COMMON JOB STRUCTURE

5.1 Having conducted a jobs audit, the next step, once the new organisational arrangements are in place, will be to design a common job structure. This entails consideration of how the organisation should be structured to meet its needs in the future. This could be quite different from the traditional jobs and structure which operated in the old organisation(s). In particular, re-configured organisations involved in workforce modernisation projects should consider the implications of such projects for the new organisation.

5.2 Designing a new job structure is a major exercise which will obviously need strategic direction from senior managers, will have to involve managers at all levels and should be undertaken in partnership with the relevant trade unions.
6. DECIDING THE NEXT STEP: IMPLEMENTING THE COMMON JOB STRUCTURE OR IMPLEMENTING JOB EVALUATION

6.1 The crucial decision at this stage is to agree the order in which the next steps in the exercise take place. There are two possible options:

- Implement a common job structure and then undertake job evaluation; or,
- Evaluate the jobs that exist on merger, implement the new job structure and then re-evaluate new jobs in the structure as necessary.

6.2 Each approach has advantages and disadvantages. The advantage of the first approach is that it potentially saves time in not having to have two rounds of evaluations. However, implementing a new job structure is a major exercise and can be very time consuming and involved. It can also prove de-stabilising for employees. Further, until such time as the job evaluation scheme has been implemented, the organisation remains at risk of equal pay claims. Thus the advantage of the second approach is that the risk of equal pay claims is reduced to an absolute minimum. Note that those jobs which remain the same in the new structure will not need to be re-evaluated, unless a very long period of time has elapsed before the second round of evaluations. This approach also allows for job re-structuring (and any further evaluations) to be carried out in a phased programme. The second approach is therefore recommended.

7. CHOICE OF JOB EVALUATION SCHEME

7.1 An early decision is which job evaluation scheme to use for the re-configured organisation, and whether to use a paper-based or computerised version, such as Gauge. For a few jobs a paper-based scheme may be appropriate but for larger numbers of jobs a computerised scheme such as Gauge is more time and resource efficient. It may be tempting to think that, if both predecessor organisations to a new unitary authority, for example, have used the same JES, no further action is required. However, as the predecessor organisations will generally have different grading and pay structures, a review will be required. It is also the case that the JE schemes in use in the local government sector are not as centrally prescribed as, for instance, the Health Service Job Evaluation Scheme and give scope for local conventions (and Help Screens on Gauge), so it is unlikely that the same job would have been evaluated in exactly the same way in the predecessor organisations, even on the same job evaluation scheme. At minimum an audit of job evaluation outcomes will be required.

7.2 It is not sufficient to simply align jobs with a new pay structure on the basis of historic JE results or historic pay, without reviewing the JE outcomes. Such an approach risks the jobs being considered not to have been properly evaluated.
under the same job evaluation scheme and not therefore covered by any JE
defence to equal pay claims.

7.3 Where predecessor organisations have used different job evaluation schemes
for their Single Status employees, it is possible for a jobholder covered by one
scheme to claim equal pay with a job holder covered by a different job
evaluation scheme. In such cases, the job evaluation schemes may not
provide the employer with a defence. To avoid claims of this nature, the re-
configured organisation should introduce one scheme for all employees
across the new organisation, with a single set of local conventions (or
computerised JE local help screens). Depending on the circumstances, it may
be appropriate to select one of the current schemes in operation or it may be
appropriate to choose a different scheme. Either way, it is necessary to
evaluate all jobs under the new scheme, including any that were previously
evaluated.

8. **FIRST PRACTICAL STEPS**

8.1 At the outset of the exercise it would be appropriate to:

   a. **organise the logistics.** for example, timescales, project management and
      resources for the introduction and evaluation of a common job structure for
      the merged organisation. This step should include a review of relevant HR
      and finance IT systems to ascertain what data they can provide and whether
      they are compatible.

   b. **develop a common terminology.** A possible barrier to progress is use in
      the constituent organisations of the same term for different concepts (roles,
      policies, structures) and different terms for the same concept. As the
      meanings of words are important in the context of job evaluation, it may well
      be worth spending some time at the outset on clarifying and defining terms
      likely to be used frequently.

   c. **devise a communications strategy.** Employees in the new organisation
      are likely to be particularly anxious about their positions. Therefore it is
      imperative to ensure good communications keeping employees informed of
      progress. Communications strategies can include use of cascade briefings,
      seminars and roadshows, newsletters, dedicated website location with
      reference documents and regular updates, and identified communicators.

   d. **develop a training strategy** for all those who will actively participate in the
      exercise, including steering group members, evaluation panel members,
      Gauge facilitators and job analysts. Even if some participants have previously
      received training, this is likely to have been a long time ago. Training should
      be jointly provided and received and ideally will be extended as appropriate to
line managers and TU representatives who may find themselves providing advice to employees/union members.

9. **FURTHER GUIDANCE ON IMPLEMENTING THE JOB EVALUATION SCHEME**

9.1 This Technical Note does not provide detailed guidance on implementation. Previous Technical Notes in this series, for example, on selecting benchmarks, dealing with multiple job groups, provide guidance on implementing job evaluation in accordance with best practice recommendations. All Technical Notes are available on the Local Government Association website as part of the NJC job evaluation documentation at [http://www.local.gov.uk/web/guest/workforce-local-government/-/journal_content/56/10171/3702152/ARTICLE-TEMPLATE](http://www.local.gov.uk/web/guest/workforce-local-government/-/journal_content/56/10171/3702152/ARTICLE-TEMPLATE). These apply whether the new organisation is using the Gauge or paper-based version of the NJC JES and most are relevant to other schemes in use in the local government sector.


10. **THE NEXT STEPS: GRADING AND PAY**

10.1 In anticipation of completing the job evaluation exercise, consideration should be given, in partnership with trade unions, to:

- Communication of outcomes to employees;
- Appeal processes;
- Designing a new grading and pay structure;
- Harmonising terms and conditions (contractual and non-contractual); and,
- Negotiating and implementing pay protection arrangements as necessary. The constituent organisations may find they have differing pay protection arrangements, so these need to be reviewed at an early stage and checked to ensure that they meet current legal requirements.

10.2 Each of these stages is likely to give rise to equality issues and therefore it is recommended the organisation takes specialist legal and pay structure advice at appropriate points in the exercise.

10.3 It is also good practice to undertake an Equality Impact Assessment on the proposed new grading and pay structure, including the job evaluation exercise and outcomes, before implementation and regular equal pay audits thereafter.
11. FURTHER GUIDANCE ON GRADING AND PAY

11.1. Further joint guidance is set out in the following sections of the NJC Green Book:

- Part 4.9 Pay and Grading Reviews
- Part 4.10 Equal Pay Audits
- Part 4.11 Equality Impact Assessments
- Information about the Green Book is at http://www.local.gov.uk/web/guest/workforce-local-government/-/journal_content/56/10171/3700149/ARTICLE-TEMPLATE

11.2 The EHRC’s Equal Pay Audit toolkit is a guide on carrying out an equal pay audit. It also gives advice on good equal pay practice, on conducting equality impact assessments and provides guidance on actions arising from the audit that may need to be taken to eliminate any pay gaps.